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No. 114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

STEWART B. HOPPS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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INDEX

	Page
Reply Statement	2
The California Search and Seizure	2
Acquisition of the California Papers by Federal Prosecutors	5
The New York Papers	7
Reply Argument	7
The California Search and Seizure	9
Acquisition of the California Papers by Federal Prosecutors	11
Papers of Corporations Other Than International	12
The New York Papers	15
Failure to Suppress	16
Maryland Papers	17
Instruction	18
Conclusion	19

CITATIONS

Aguilar v. *State of Texas*, 84 S. Ct. 1509 (1964)	10
Amos v. *United States*, 355 U.S. 313 (1921)	10
Elkins v. *United States*, 364 U.S. 206 (1960)	10
England v. *Doyle*, 281 F. 2d 304 (9th Cir. 1960)	11
Giordenello v. *United States*, 357 U.S. 480 (1958)	10
Go-Bart Importing Co. v. *United States*, 282 U.S. 344 (1931)	10
Hale v. *Henkel*, 201 U.S. 43 (1906)	17
Henzel v. *United States*, 296 F. 2d 650 (5th Cir. 1961)	14
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	8
Jones v. *United States*, 362 U.S. 257 (1960)	14
Lagow v. *United States*, 159 F. 2d 245 (1946)	14
Malloy v. *Hogan*, 84 S. Ct. 1489 (1964)	15

Page

Marron v. *United States*, 275 U.S. 192 (1927) 10
Nathanson v. *United States*, 290 U.S. 41 (1933) 10
Oklahoma Press Publishing Company v. *Walling*, 327 U.S. 186 (1946) 17
Reisman v. *Caplin*, 375 U.S. 440 (1964) 12
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1960) 16
Takahashi v. *United States*, 143 F. 2d 118 (9th Cir. 1944) 8
United States v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950) .. 16
United States v. *Goldstein*, 120 F. 2d 485 (2d Cir. 1941) 16
United States v. *Guterma*, 272 F. 2d 344 (2d Cir. 1959) 14
United States v. *Lefkowitz*, 285 U.S. 452 (1932) 10
United States v. *Paroutian*, 299 F. 2d 486 (2d Cir. 1962) 16
Walker v. *Peppersack*, 316 F. 2d 119 (4th Cir. 1963) .. 8
Wilson v. *United States*, 221 U.S. 361 (1911) 17

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REPLY BRIEF FOR PETITIONER

Initially, it is noteworthy that the entire theory of the prosecution at Hopps' trial rested upon the premise, as alleged in the indictment, that Hopps "dominated and controlled" International—essentially that he was the alter ego of the corporation in this country. Yet, in testing his Constitutional rights under the instant petition, the Government ostensibly would reduce his

relationship to a peripheral advisory and operational capacity not achieving standing to assert such rights. They can't have it both ways!

REPLY STATEMENT

The Government's brief in opposition is in substantial error at the outset in alleging that the evidence in this case is not in issue (p. 2).[1] To the extent that the Government's statement may be assumed to be its characterization of the evidence adduced, there is a very real and distinct issue as to the evidence. In numerous instances the brief in opposition states the "facts" in such manner as to lead to the conclusion that the investigation, prosecution and conviction of Stewart B. Hopps was in all respects legal, eminently "reasonable", and untouched by error. Such, however, is not the case. The Government's statement avoids completely the vital elements which make it absolutely clear that the investigatory stages of the prosecution of Hopps—a classic in State-Federal cooperation and common purpose—was fraught with error of such nature as to leave no doubt that the "evidence" thus acquired must be suppressed in a trial of Hopps.

The California Search and Seizure

The Government refers to the office at Suite 1001, 417 Montgomery Street, San Francisco, California, as "*an* office" from which International "carried on business" and in which it "kept its books and records" (p. 4). The fact is, however, that the suite at 417 Montgomery Street was the *private office* of Stewart B.

[1]Reference (p.) is to page of Government's brief in opposition. Reference "I-R" refers to Appellant's appendix and "II-R" to Appellee's appendix in the Court of Appeals, both part of the record here.

Hopps and his wholly owned and controlled corporation, U. S. Marine and Foreign Securities, and that, in fact, the search of the suite by representatives of the State of California failed to turn up *any* of the basic corporate records of International (I-R 278). The papers seized from the file cabinet marked "International" were essentially copies of Hopps' correspondence relating to his dealings with International and other corporations.[2] Stewart B. Hopps was the only person who could give meaningful consent to a search of suite 1001. It is undisputed that he did not consent to the search on April 14 and 15, 1958, and that he did not authorize anyone else to consent thereto.

Eugene Clifford, who represented International in the California conservatorship proceedings, had neither the rights nor power to authorize or agree to a search of Hopps' private office for records of International and in fact consistently denied that he had done so. The Government refers to the presumptuous statement by Clifford to California officials that they were welcome to see anything in Hopps' office "with respect to International" (p. 5).[3] The uncon-

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[2] The Government attempts (pp. 5-6) to depict the proceedings at Suite 1001 as a well ordered, "agreed to" turnover of a single file drawer of "records" of International. As stated, there were no such documents in the office and the record of this case leaves absolutely no doubt that the California officials carried out a two day, full-scale, *virtually limitless search* resulting in the indiscriminate seizure of material from numerous file cabinets, tops of desks and a table and from desk drawers. A stenographic notebook (unintelligible to the searchers) and rubber stamps (from the office vault) were also seized (I-R 285-86).

[3] Significantly, Clifford's statement was in direct response to the statement of one Haas, a California official, wherein Haas concluded "But the files dealing—down there [suite 1001]—with International aren't necessarily Mr. Hopps' ". (II-R 14)

troverted facts remain, however, that Clifford himself did not believe that International had an office in San Francisco; he considered suite 1001 to be exclusively Hopps's private office; he believed there were no International records in the suite, and he neither attempted to nor did he secure Hopps' authority to permit a search of the office (I-R 211-220).

It is perfectly clear that Clifford himself knew and freely admitted that he had no authority to agree to the search of suite 1001—and that he did not do so. He regarded himself as under the compulsion of the court order and took no part in selecting the papers removed (I-R 214-220). Further, even had Clifford been empowered to authorize the search of Hopps' private office, his failure to object to the taking of papers therefrom is not to be equated with consent to the taking.[4]

In sum, the relevant facts as to the search and seizure at Hopps' San Francisco office are that (1) California officers entered Hopps' private office without his consent or knowledge, without a search warrant or service upon Hopps of the *ex parte* civil conservatorship order; (2) Hopps did not authorize anyone to consent to the search of his office; and (3) California officials found no basic corporate records of International but removed from Hopps' office papers consisting chiefly of copies of Hopps' correspondence relating to various insurance companies with which he did business.

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[4] As the trial court stated: "In view of the fact that Clifford was faced with the court order, his failure to object to [the taking of] the papers did not amount to a completely voluntary consent to the taking." (I-R 167)

Acquisition of the California Papers by Federal Prosecutors

The California Insurance Commissioner subsequently (in April, 1960) delivered the papers seized from Hopps' San Francisco office to the United States Attorney in Baltimore, Maryland, pursuant to a subpoena *duces tecum*. The surrender of these papers was *without the authority of the conservatorship court* which had retained jurisdiction over the conservatorship since issuing the initial order. The Government's attempt (p. 7) to demonstrate any authority in the Insurance Commissioner for surrendering the papers is manifestly in error.

Correctly stated, the facts regarding the manner in which the United States Attorney, Baltimore, came into possession of the papers seized from Hopps' San Francisco office are these: On March 30, 1960, the California conservatorship court ordered the papers returned to the "respondent insurer", the liquidation proceedings having been terminated. Significantly, on the very next day, the California Insurance Commissioner was served with a Federal subpoena directing him to produce the papers in connection with the case of *United States* v. *Commercial Savings and Loan Association*, then pending in the U. S. District Court in Baltimore, Maryland.[5] However, at that time the Insurance Commissioner was still in possession of the

[5] Eugene Clifford was served with a similar subpoena on April 8, 1960, and thereafter moved the U.S. District Court in California to quash the subpoena on the grounds that it failed to specify the papers to be produced. The court ordered that the subpoena be made more specific. This was done, and, as stated by Mr. Clifford, "the subpoena was held to be in good order" (II-R 11). The papers from Hopps' office were sent to the U.S. Attorney, Baltimore, pursuant to the subpoena served on the Insurance Commissioner and not the subpoena served on Clifford.

papers and there was an outstanding order of the conservatorship court for the return of the papers. In spite of the outstanding order and in response to the subpoena from Baltimore, the Insurance Commissioner sent all of the papers to the United States Attorney in Baltimore on or about April 28, 1960.

The only additional order entered by the conservatorship court was its order of May 12, 1960 (long after the papers had been sent to Baltimore) at which time it vacated the portion of its March 30, 1960, order requiring return of the papers of International but specifically reserved to itself the power to "make further and proper Orders concerning said files and records" (II-R 140). However, the Commissioner's unauthorized, prior transmission of the records to Baltimore had effectively ousted the conservatorship court of its jurisdiction over the papers and had rendered meaningless the court's retention of power to make further orders as to their disposition. No further orders were issued and the United States Attorney in Baltimore proceeded to use the papers (which were never returned) not only in the *Commercial* case (for which purpose they were ostensibly subpoenaed) but also in all phases of the prosecution of Stewart B. Hopps.

It is significant that the papers thus secured and used by federal prosecutors were the very same papers which had been inspected, solely upon the authority of the *ex parte* conservator, by federal postal inspectors within 30 days of their seizure by California officials and later examined and copied by Internal Revenue agents. The consuming interest of the Federal Government in securing these papers is further evidenced by the fact that the federal postal inspector chiefly responsible for the investigation of Hopps had conferred with California insurance officials approximately one month *prior to* the search and seizure at suite 1001.

The New York Papers

Stewart B. Hopps maintained a private office at 44 Wall Street, New York City. There, as in California, he maintained numerous personal files relating to his various insurance interests. The files belonged exclusively to Hopps. The record is devoid of any evidence that he had ever authorized anyone, including his former secretary, Loretta Lindhauer, to remove any of the files from his office or consent to such removal. However, on February 8, 1960, while Hopps was out of the city, Loretta Lindhauer, a secretary located at Hopps' office, made available certain of Hopps' files to representatives of the New York Attorney General in response to an "investigative subpoena" which was served on her and which called for her to produce "your correspondence files" pertaining to International. Lindhauer had no such files and no authority to surrender Hopps' files. The record reflects recognition by the New York authorities that Hopps' office and papers were involved (I-R 266). Federal prosecutors subsequently obtained these files from New York authorities.

The Government's statement (p. 8) that Lindhauer had "custody" of the files which she turned over to New York authorities is without support in the record.

REPLY ARGUMENT

The Government's assertion (p. 11) that Hopps did not challenge the California civil conservatorship proceedings—even if true—is entirely irrelevant to the issues posed.[6] It is fundamental that a motion to sup-

[6] In fact, Hopps asked Clifford to secure return of his papers. Further, a member of Clifford's firm (Dinkelspiel) demanded return of the papers in behalf of International on numerous occasions. (I-R 221)

press evidence seized in violation of the Fourth Amendment is timely if made before trial. *Takahashi* v. *United States,* 143 F. 2d 118 (9th Cir. 1944). Hopps' motion to suppress was timely made and must be considered on its merits. Even the Government does not conclude that Hopps has waived any of his rights in his papers; for to waive a constitutional safeguard there must be an intentional relinquishment or abandonment of a known right or privilege. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938); *Walker* v. *Peppersack,* 316 F. 2d 119 (4th Cir. 1963).

The complete answer to the Government's suggestion that Hopps may have been dilatory in asserting his rights lies in the fact that at *no time* (incident to the seizure of the California, New York or Silver Spring papers) was Hopps ever served with process of any kind or, indeed, had prior knowledge that process was to be served. Hopps was deprived of any occasion to seek *an intervening judicial determination* prior to invasion of his Constitutional rights.

Far from supporting the proposition that Hopps failed to challenge the California proceedings, the record suggests that California officials intentionally *avoided* serving Hopps for the essential reason that they feared his general competence and that he may have been "too smart" for them.[7]

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[7] As evidenced by the statements of the California Insurance Commissioner and his deputy directly responsible for the conduct of the conservatorship proceedings, including the search and seizure at suite 1001 (Motion hearing transcript, pp. 1089-90).

The California Search and Seizure

The Government's attempt to cloak the California search and seizure with legality and reasonableness (p. 11) ignores the salient record facts. This is not a case involving the imposition of a state civil conservatorship attending the taking over of a business by conventional process. Indeed, the *ex parte* conservatorship order was not even served on Hopps, despite the clear recognition by state officials that they knew the suite searched was Hopps' office (I-R 202). Moreover, it was admitted that there was no intention to take over the operation of International's business from Hopps' office (I-R 290).

Of overriding significance, however, is the fact that the imposition of a civil conservatorship does not embrace authority to invade, search, and effect a seizure at an individual's private office (and thereafter employ the product of the search and seizure in a criminal prosecution of the individual). A state court's order, issued *ex parte*, is not a license to prostitute Fourth Amendment rights. Indeed, the order itself provided specifically:

> ". . . that the applicant is authorized to initiate such legal or administrative action . . . as may appear to him necessary to carry out his function as conservator." (I-R 412)

Bearing in mind that the balance of the order had not vested the conservator with even a suggestion of the power to invade Hopps' office, nor, in fact, any premises, the above-cited provisions could have contemplated nothing if not that, failing to secure the books, records, and property of International voluntarily, the conservator could and

must return to the appropriate court for further implementing authority to secure the concerned papers. Manifestly, the California officials so understood the order, otherwise they would not have sought the abortive "consent" to search Hopps' office.

The simple fact is that the state officials *suspected* that International's business was being conducted from Hopps' office (most certainly contrary to fact as of April 14, 1958) and desired to search the office in contemplation of such suspicions. The papers searched for and seized at Hopps' office were utilized in a federal criminal prosecution of Hopps and, in consequence thereof, the lawfulness of the use of such papers as evidence against Hopps must be tested by *federal standards* related to criminal prosecutions. *Elkins* v. *United States*, 364 U.S. 206 (1960). By these standards, Hopps' office could only be searched for the purpose of seizing the fruits or instrumentalities of crime and then only pursuant to his voluntary consent or a search warrant identifying the property and describing the place to be searched, issued by a judicial officer after a finding of probable cause supported by affidavit. *Marron* v. *United States*, 275 U.S. 192 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931); *Giordenello* v. *United States*, 357 U.S. 480 (1958); *Nathanson* v. *United States*, 290 U.S. 41 (1933).[8] None of these standards were satisfied.

Even were it assumed that the *ex parte* order could be equated with a warrant to search for the records of

[8] The principles expressed in *Nathanson* were recently restated and emphasized by this court in *Aguilar* v. *State of Texas*, 84 S. Ct. 1509 (1964). There would now seem to be no doubt as to the necessity for a precise demonstration of probable cause in the application for a search warrant.

International, its validity was vitiated by the admission that the search was not limited to records of International but extended to any papers that "rang a bell" from the state officers' investigation (I-R 292).[9] A search initially lawful may become unlawful by reason of the actions of the searchers.

The ultimate answer to the Government's contention that the California Insurance Department officials proceeded "reasonably" in searching the premises of Stewart B. Hopps at Suite 1001, 417 Montgomery Street, San Francisco, California, lies in the basic Constitutional premise that, absent unqualified consent or unusal or extenuating circumstances in the public interest or attending a search incident to an arrest, *any search of fixed premises without a search warrant is by reason of such fact alone unreasonable.*

As has been demonstrated (p. 4, *supra*), there was no legally cognizable consent to the search of Hopps' California office. There can be no consent under compulsion. *Amos* v. *United States*, 255 U.S. 313 (1921). Dispositive of the consent question, even as to International, is the fact that the mere existence of the attorney-client relationship is insufficient to authorize the attorney to waive a substantial right of his client. *England* v. *Doyle*, 281 F. 2d 304 (9th Cir. 1960).

Acquisition of the California Papers by Federal Prosecutors

The Government finds itself on the horns of dilemma in its attempt to demonstrate some authority in the California Insurance Commissioner for delivering the

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[9] Even items that rang no bell were seized. The stenographic notebook which was seized was *admittedly unintelligible* to the searchers—not even the Government can apologize for its seizure. This same notebook was used by the prosecution at trial to prove a vital element of the mailing count of the indictment. (I-R 318).

seized papers to federal prosecutors. On the one hand it argues (p. 12) that the Commission needed no authority from the conservatorship court before disposing of the papers—on the other hand it argues that the Commissioner in fact applied to the court for such authority. In apparent appreciation of this dilemma, the Government resorts to an entirely nonexistent "oral" authority of the conservatorship court but, as demonstrated above (p. 5, *supra*), there is not a scintilla of evidence in the record to support this contention. To the contrary, the record makes it absolutely clear that (1) the papers were sent to Baltimore *after* the conservatorship court had ordered their return, and that (2) the court's order of May 12, 1960 (two weeks *after* the papers were sent to Baltimore) went only to vacate the requirement that the papers be returned and did *not* authorize the delivery to federal prosecutors, the court specifically reserving the power and right to make further orders as to the disposition of the papers.

The issue here is the necessity for *an intervening judicial determination* before the conservator—with only naked possessory interest for limited purposes—may divest the rightful owner and the conservatorship court of their rights in and control over the papers. This court has recently expressed the view that such a judicial determination is necessary. *Reisman* v. *Caplin*, 375 U.S. 440 (1964). Although that case involved Internal Revenue proceedings, the rationale is submitted as clearly applicable to the case at bar.

Papers of Corporations Other Than International

The Government's brief (p. 13) fails utterly to come to grips with the issue arising out of the trial court's refusal to suppress papers seized from Hopps' San

Francisco office which belonged to corporations other than International. The conclusion is inescapable that the trial court erred in refusing to suppress such papers.

Initially, the court found that "Clifford did not have the authority to authorize a search for papers belonging to any individual or other corporation, even if they related to International's business, *and the court order did not authorize such search*" (emphasis added; I-R 167). Further, the court concluded that:

> ". . . Hopps has standing to attack an allegedly unlawful search and seizure at the 417 Montgomery Street office, of his own papers or of the papers of a corporation, such as U. S. Marine, which he and his wife substantially owned * * * [and] * * * Hopps also has standing to attack an allegedly unlawful search and seizure at that office of papers of Anglo-Can, MCA, AASU and the other corporations which he owned or controlled." (I-R 165).

Clearly then, there was absolutely no authority for the seizure of papers of corporations other than International and the court accorded Hopps standing to attack such a seizure. However, the court absolutely denied Hopps the right to exercise such standing—*exclusively for the reason that Hopps was doing business in corporate form*—by ultimately holding:

> "With respect to any such papers which may have belonged to corporations other than International, there was also a seizure as well as a search. But although Hopps has standing to raise any right which he himself may have with respect to such papers, he may not rely on the possible rights of the respective corporations. '*When a man chooses to do business as a corporation, even though he is its sole shareholder, he may not take*

> *on the privilege of the corporation under the Fourth Amendment* * * *" *Lagow* v. *United States*, 2 Cir. 159 F. 2d 245, 246, quoted with approval in *United States* v. *Guterma*, 2 Cir. 272 F. 2d 344, 346" (emphasis added, I-R 170)

As treated at length in the petition herein (pp. 18-23), the court's holding—and its reliance on *Lagow*—flies in the face of the principle established by this court in *Jones* v. *United States*, 362 U.S. 257 (1960), and is diametrically opposed to the holding in the Fifth Circuit case of *Henzel* v. *United States*, 296 F. 2d 650 (5th Cir. 1961). The facts in this case accord in all material respects with those in *Henzel* where the court correctly held that the mere fact of corporate operation was of no moment in determining the Fourth Amendment rights of an individual in his property.[10]

The Government's effort, in terms of standing, to distinguish the principle of the *Henzel* case on the basis of the proprietary interest involved ignores completely the fact that many of the papers seized at Hopps' office and not suppressed were papers of his wholly-owned corporation, U. S. Marine and Foreign Securities, together with correspondence relating to business conducted by Hopps with such corporations as Anglo-Canadian Underwriters, Mortgage Corporation of America, and American Armed Services Underwriters. While refusing to suppress the papers relating to such corporations, the trial court as above indicated found that Hopps had *standing* to attack their seizure and the prosecu-

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[10] In its note 10, p. 13, the Government stresses the fact that in *Henzel* the search was "directed at" the defendant. Significantly, the trial court here found that the San Francisco search was "directed at Hopps as well as International."

tion conceded such standing. The refusal to suppress these papers was based on the erroneous assertion that, despite Hopps' standing, he was impotent to occasion their suppression simply because corporations were involved.

Posed squarely for determination by this court is the question of whether illegally seized correspondence relating to corporations, maintained in an individual's private office, are per se immune from a motion to suppress filed by the individual (defendant) before trial.

The New York Papers

It is undisputed that the New York statute authorizing the "investigation" whereby New York authorities obtained documents from Hopps' New York office relies for its constitutionality on a concomitant grant of immunity. Hopps' papers were obtained by means of a subpoena served—in Hopps' absence—upon one who had no right to produce them. The papers were subsequently delivered by New York state officials to federal authorities and were used in a federal prosecution of Hopps. He was afforded no immunity on the grounds that he himself had neither produced the documents nor testified in the State proceedings (Government brief, p. 15). It is submitted as fundamental that only if the immunity grant attached to Hopps could *his* papers be demanded by the State.[11] And this is so even if Lindhauer had custody of Hopps' papers.

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[11] The papers taken from Hopps' New York office were turned over to federal authorities and used in the federal prosecution of Hopps. It is submitted that the failure of both the state and federal governments to accord Hopps the required immunity as to these papers falls within the pale of this court's recent pronouncements in *Malloy* v. *Hogan*, 84 S. Ct. 1489 (1964) where the failure to accord the required immunity at the state level is condemned.

Can a man's Fifth Amendment rights be skirted by the expedient of serving a subpoena for his papers in his absence from his office upon a person located at his office? To ask the question is to answer it.

Failure to Suppress

Hopps was clearly denied the means of identifying the unspecified "personal papers" which the trial court ordered suppressed and was also denied the means of determining the extent to which such papers had afforded investigatory leads or otherwise tainted the entire prosecution. Such rights are well established. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1960); *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950); *United States* v. *Goldstein*, 120 F. 2d 485 (2d Cir. 1941); *United States* v. *Paroutian*, 299 F. 2d 486 (2d Cir. 1962). In its argument to the contrary (p. 15), the Government suggests that Hopps did not meet his obligation in seeking identification of the suppressed documents nor in pursuing his right to a hearing as to their utilization. This argument ignores completely the fact that in connection with his motion to suppress Hopps had not only alleged but also submitted an exhaustive affidavit demonstrating that *all* of the papers seized were his "personal papers" or those of his wholly-owned and controlled corporations. Despite this, the court refused to identify and segregate the suppressed documents.

Further illustrative of the unreasonable and unrealistic position taken by the trial court is the Government's argument that the court was not obliged to grant a hearing as to the use to which the papers had been put because Hopps had "failed to comply with the court's request that he specifically identify the

papers which allegedly contaminated the evidence". At that juncture, Hopps could certainly not be held to have known or have had any meaningful idea as to exactly how any of the papers had been used. The very essence of *Silverthorne* is that this is knowledge within the breast of the prosecution. As a consequence, the defendant is to be afforded the right to inquire, by means of a hearing, as to the use of any suppressed evidence. Here, there was no meaningful suppression and, of course, no hearing. Hopps had a right to both.

Maryland Papers

The Government's reply statement (p. 9) does not meet the implications of the fact that federal authorities acquired papers used in the prosecution of Hopps by means of a subpoena *duces tecum* calling for the production of "... *all* documents, records, papers and correspondence in the possession of said Corporation [International Guaranty and Insurance Underwriters, Inc.] at the time of the service of the subpoena" (emphasis and brackets added)? This subpoena could not be broader and is illegal per se. *Hale* v. *Henkel*, 201 U.S. 43 (1906); *Wilson* v. *United States*, 221 U.S. 361 (1911); *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186 (1946). Hopps' standing to challenge evidence so obtained is reflected in the trial court's finding that Hopps supervised and directed the business of International Guaranty and Insurance Underwriters, Inc., and that its office was staffed by members of the "Hopps corps". (I-R 153).

Instruction

By means of its instruction (petition, p. 32), the trial court allowed the jury to find specific knowledge in Hopps (such knowledge being necessary to conviction) from evidence adduced on an entirely unrelated matter (the availability of reinsurance) which was itself ultimately withdrawn from the jury as a basis for conviction.

The Government (pp. 16-17), as did the Court of Appeals, attempts to uphold the instruction on the ground that, by its terms, it allowed the jury to find only Hopps' willfulness and/or fraudulent intent in committing the acts alleged in the indictment. Even if this were a valid argument, however, it neither meets nor disposes of the error complained of, i.e., the jury should not have been allowed to find Hopps' specific knowledge of the alleged valuelessness of specific assets (an element necessary to conviction) from evidence adduced on an entirely unrelated matter. Without the instruction complained of, it is quite possible that Hopps would have been acquitted.

CONCLUSION

The petition for certiorari presents substantial and important questions bearing upon fundamental Constitutional rights and should be granted, particularly in consideration of the marked conflict in holdings of the Second, Fourth, and Fifth Circuits.

Respectfully submitted,

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